

October 2, 2009

Mr. Matt Josephs
NMTC Program Manager
Community Development Financial Institutions Fund
U.S. Department of Treasury
601 13th Street, N.W., Suite 200 South
Washington, DC 20005

Dear Mr. Josephs:

Bank of America would like to submit the following comments in response to CDFI Fund's request for comments on the New Markets Tax Credit (NMTC) Program – Allocation Application issued on August 3, 2009. We have focused our comments on those areas we are able to address based on our experience with the NMTC program, specifically Questions 1 through 7.

Question 1: Is the information that is currently collected by the Application necessary and appropriate for the Fund to consider for the purpose of making award decisions? Please consider each question and table in the Application. Are there questions or tables that are redundant and/or unnecessary? Should additional questions or tables be added to ensure collection of more relevant information?

In general, the information that is currently collected by the Application, such as Applicant and Controlling Entity track record, infrastructure, product offerings, community impact, capitalization, and fee structure, is directly relevant to the award decisions. We would therefore like to suggest areas of the application that might be streamlined for ease of preparation and review. First, we would recommend that the impact statistics requested in the "C" tables be added to the "A" and "B" tables and the "C" tables be eliminated. Much of the information presented in the "A" and "B" tables is requested/reported again in the "C" tables, such as number of projects, amount of total financing and Applicant financing. In preparing the application, it is easier to record all of the data related to any given transaction in a single spreadsheet and tabulate the totals, which may be entered in various narratives and tables throughout the application. In light of that, it would be more efficient for the application preparers to enter all of the project-related data in a single table, and it would also provide a complete snapshot of previous or pipeline activity and impact for reviewers at a single glance.

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We would also like to call your attention to the fact that the application asks in Questions 8b, 15, and 24 how the Applicant will use the NMTC to enhance or improve its current activities. We would like to recommend that Question 8b and the final bullet point in Question 15 be deleted as they are addressed in detail in Question 24.

There is also an opportunity to streamline Question 30, focusing on the targeted impacts expected to be achieved and how they will be quantified. In many cases, the method of obtaining and verifying the impact data is the same regardless of the particular impact being measured. As such, we would recommend asking Question 30b (ii) only one time to address all ten impacts in the question.

Other areas of the application that have overlap include the discussion of track record and pipeline in both the business strategy section and the community impact section as well as the discussion of QLICI activities in both Question 19 and Question 44b.

Finally, we would respectfully ask you to consider allowing applicants to reflect their full pipelines of projected activities in the tables rather than limiting them to the amount of allocation requested. This information is directly relevant to an applicant's ability to quickly move on to another transaction should a transaction fail to move forward. It also speaks to the applicant's ability to reinvest any return of capital or principal payments received during the compliance period.

Question 2: Are the thresholds contained in Question 17 of the Application appropriate, given current economic conditions? If not, what should the criteria include? Should the Fund provide a range of flexible product commitments based on a discount of interest rates below market as defined by basis point reductions (or other product flexibilities) or continue to present commitment options in percentage terms?

Current economic conditions have made it nearly impossible for CDEs to obtain real leverage debt, which means most CDEs are currently unable to offer must-pay debt products to QALICBs. Unfortunately, we must come to grips with the fact that, in many cases, the benefit to the QALICB in the current market is that it can obtain NMTC debt at all. We must therefore ask an even more fundamental question than how to assess a CDE's below market pricing. Instead, perhaps we should ask if it is even practical to evaluate below market pricing when real loans are so rarely being made. To the extent that there are still financial institutions, such as Bank of America, that are still willing and able to provide leverage debt, current economic conditions have forced leverage lenders, and in turn, CDEs, to tighten underwriting criteria to mitigate credit risk. As such, it is becoming increasingly difficult to offer the level of product flexibility CDEs offered during the earlier years of the NMTC program. There is particular pressure on loan-to-value maximums and debt service coverage requirements.

Currently, CDFI Fund measures flexible product criteria on each individual QLICI within a given transaction as reported in CIIS. We would suggest that CDFI Fund test the flexible criteria on the total NMTC financing provided by a CDE to a single QALICB as part of a single transaction rather than applying the test to each individual facility. This would not relax the CDEs' requirements to provide flexible and favorable financing to QALICBs, but it would make it easier to demonstrate the level of flexibility provided and

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would paint a much more holistic picture of the financing package and the ultimate benefit the QALICB has received.

Question 3: A CDE is entitled to earn five “priority points” for committing to invest substantially all of its QEI proceeds in businesses in which persons unrelated to the CDE hold the majority equity interest (within the meaning of I.R.C. section 267(b) or 707(b)(1)). With respect to the timing of this test, the CDFI Fund has determined that it is to be applied after the initial investment is made, and for the life of the seven-year compliance period (though an exception is permitted if events unforeseen at the time of the initial investment causes the CDE to have to subsequently take a controlling interest in the business). Is it appropriate that this test is applied after the investment is made? If the test is to be applied before the investment is made, then how should the Fund treat circumstances whereby the receipt of the QEI and the investment in the business is essentially a simultaneous transaction, particularly when the CDE may not have any owners identified prior to the QEI closing?

As a member of the New Markets Tax Credit Steering Committee of the National Housing and Rehabilitation Association (“the Committee”), we fully support the argument set forth in the Committee’s response to this question. We agree that the related party test should be applied before the investment is made to avoid the unintended consequence of prohibiting CDEs from making equity investments in QALICBs that would represent a majority interest as defined in I.R.C. section 267(b) or 707(b)(1). As noted in previous communications with the Fund, performing the test after the investment is made typically forces the CDE to structure all of the QLICIs as debt. This places a substantial burden on the projects and gives rise to many technical issues, such as the ability to meet the qualifications of true debt and the tax implications to the QALICB of leaving the subsidy portion of the debt in the project. In most cases, these issues can be overcome through careful structuring, but this adds significant cost to a transaction, effectively reducing the subsidy that will remain for the QALICB.

CDFI Fund has expressed a reasonable concern about the ability to perform a test for relatedness when the QEI and QLICI happen almost simultaneously. In reality, QEIs and QLICIs are quite often funded the very same day in order to alleviate investor concerns about how and when their money will be deployed. Despite that, there is typically ample time for the CDE to evaluate the relationship between the investor and QALICB prior to QEI issuance. Most QEI investors work with CDEs to perform substantial due diligence on proposed QALICBs during the weeks and months leading up to the QEI closing. Thus the CDE is well aware of who the potential investors are and can easily submit questions to those potential investors and the QALICB to test for relatedness. It is ultimately the CDE’s responsibility to perform this test prior to the QEI and QLICI investments and to obtain the necessary documentation to support the conclusion.

Question 4: The Application currently collects outcome information on the applicant’s historic community impacts and projected economic development impacts in Table C1 and Table C2, respectively, and collects information on projected community development impacts in Question 30. Are there changes that should be made in the way projected economic development is currently measured? Are there other outcomes/impacts for which the Fund should be collecting information to ensure effective use of the NMTC? Should the Fund have a greater focus on community development outcomes/impacts? Alternatively, should the Fund focus exclusively on economic development outcomes/impacts?

To begin, we believe the definition of economic impact should be expanded to include services such as: education that improves the ability of individuals to be gainfully employed; health services that reduce workers' cost of living; transportation services that

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assist workers to reach employment; and childcare services which again help increase worker productivity. Each of these is easily quantifiable. In evaluating the use of the NMTC, it is not practical to evaluate economic development impact without evaluating community development impact and vice versa as the two are inextricably connected. The economic impacts, including number of jobs created, square footage of commercial space developed or rehabilitated, and number of affordable housing units created are certainly critical impacts that the NMTC program was designed to achieve and are easily quantified. However, if the focus of the program is on these statistics alone, then many mission-oriented projects providing critical services to low-income communities and their residents would not be able to move forward. As an example, the CASA de Maryland project in Langley Park, MD is the rehabilitation of a historic mansion into the headquarters for a non-profit organization that offers a plethora of critical services to the surrounding low-income communities. The project is only expected to create 5 new permanent FTEs, however it is anticipating providing services such as computer classes, English for Speakers of Other Languages (ESOL), health outreach and testing services, leadership and economic development programs, legal and social services, and financial literacy programs to as many as 3,000 individuals in the first year of operations. One might argue that these programs are a community development impact rather than an economic development impact, but this is not the case. These services will assist in providing area residents with the skills they need to obtain good jobs and opportunities for advancement and will also assist with the job search process. Reduced unemployment and increased wages are clearly an economic development impact. With this in mind, we realize many of the community development impacts listed in Question 30 are difficult to quantify, but we believe they deserve due consideration in the narrative for both prior performance and projected activities. To the extent CDFI Fund wishes to capture this type of data in CIIS, some quantifiable impacts include number of low-income individuals served for community facility projects such as CASA, number of students enrolled for charter school projects, number of seats created and annual admissions for cultural venues, number of beds or exam rooms created or patients treated for medical facilities, etc. Ultimately, we find that a project narrative paints a far more holistic picture of the project in terms of impact, particularly when overlaid on the socio-economic context of the project.

Question 5: Do Question 56 and Table F1 of the Application capture all sources of compensation and profits that the applicant and its affiliates receive in connection with NMTC transactions? How can collection of this information be improved? How should the Fund use this information? For example, should the Fund make the applicant's stated fees a specific condition of the Allocation Agreement, and should the Fund set limits on fees in the Allocation Agreement?

Question 56 and Table F1 of the Application do indeed capture all sources of compensation and profits that the applicant and its affiliates receive in connection with NMTC transactions. With that said, we would ask the Fund to take a broader approach to this question by focusing not only on fees to the applicant and affiliates as well as the investor. We would recommend that the Fund expand this question and the related CIIS reporting to capture data on fees received by consultants, brokers, and fee developers as well. The ultimate goal is to determine who is receiving the subsidy and how much truly remains for the QALICB. The applicant's fee structure is certainly a critical component of this analysis. We would recommend that the Fund track this data in CIIS to the extent

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it is not already being done and perform a statistical analysis of the data to determine the industry norms and the outliers. Armed with that information, the Fund would have a better sense of what level of regulation/limitation, if any, it should apply to fees in the Allocation Agreement. Additionally, by tracking and analyzing fees to 3rd party developers and consultants in CIIS, the Fund would be able to more accurately determine how much subsidy is truly staying with the QALICB versus paying transaction costs, developer fees, and investor returns, not to mention the actual applicant fees. A study of transaction costs could also serve to shed light on the level of complexity of the NMTC program to the extent that certain fees that are reported are consistently high across the industry.

For the CDFI to set limits on the fees charged by CDEs, it should take into consideration the nature of the CDE. Entities that are municipalities and financial institutions are inherently able to sustain higher infrastructure costs than start-up non profits. Nonetheless, there should be a maximum set for fees that ultimately return to the entity controlling the CDE. In addition, the CDFI should make clear the intent of the program. Should the subsidy ultimately remain with the QALICB or should the CDE be able to recycle the moneys to other endeavors?

Question 6: In any given Application round, the Fund requires applicants that have received awards in previous rounds to demonstrate that they have been able to raise minimum threshold amounts of QEIs from their prior awards (see the 2009 NOAA for the current minimum threshold requirements). Are these current minimum threshold requirements sufficient? Should the Fund consider using different measurements, such as the amount of QEIs that have been deployed as investments in low-income communities?

These minimum threshold requirements are not only sufficient, but in the current economic environment, one could argue that they are just a bit too ambitious. Particularly given the tight credit market and increased considerations for QEI investors, most QEIs are not being “prefunded,” that is to say the QEI is not funded until a QLICI closing and funding is imminent. As such, financial institution CDEs and 3rd party CDEs are essentially on the same footing with regard to meeting the minimum thresholds. Given that fact, and given the fact that the regulations do provide up to twelve months to make a QLICI once a QEI is funded, we would suggest that QEI issuance is still the most practical benchmark. Additionally, QEI issuance is reported and captured in the ATS system on an ongoing basis while QLICI deployment is only reported and measured annually. Thus a CDE with a 12/31 year-end would report QLICIs deployed through 12/31/08 in the CIIS reporting due approximately 6/30/09. Assuming CDFI Fund would look to the system of record to test the minimum threshold requirements as of a particular date, testing QLICI deployment would present a significant time lag in the information. Furthermore, the amount of documentation that would have to be provided by the applicant and reviewed by the Fund would be substantially increased.

Although we would respectfully recommend against a QLICI deployment threshold to determine eligibility for any given Application round, we would suggest that CDFI Fund use current CIIS data to gauge the typical level of QLICI deployment across the industry should the Fund decide to adopt the QLICI deployment threshold. We would recommend determining industry averages at various points in the year, calculated as a percentage of

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total allocation received and/or individual allocations received. These averages could be used to determine a reasonable benchmark or minimum threshold that would be achievable for most CDEs under prevailing market conditions.

Question 7: The Fund generally caps award amounts to any one organization in a given round. In the 2009 Application round, this cap was set at \$125 million. Is this an appropriate amount? Should the Fund consider raising the cap significantly (*e.g.*, to \$250 million), and prohibit a CDE that receives such a large allocation award from applying again for an established period of time?

The Fund should indeed consider significantly increasing the cap. The NMTC program is no exception to the concept of generating economies of scale. A great deal of infrastructure is needed to support even a single transaction of any size, and legal and accounting costs are generally fixed costs as well. Clearly, the applicants would benefit from larger allocations by allowing them to close more transactions, larger transactions, or both. However, the QALICBs would potentially benefit as well. Applicants have developed their fee structures to cover the cost of maintaining the infrastructure plus some amount of profit. These fee structures were developed with the program limitations in mind. Thus, assuming the applicant's infrastructure cost is relatively fixed, the maximum allocation amount is \$125 million and the applicant anticipates being able to close ten transactions of approximately \$12.5 million of allocation each if it receives the maximum allocation, the applicant would set its fee structure to recoup the infrastructure costs from the ten projects. If, however, the maximum allocation amount were doubled, the fees passed on to any individual project could potentially be cut in half.

If the Fund were to significantly raise the allocation cap, we would respectfully recommend against prohibiting a CDE that receives a large allocation award from applying again for an established period of time. Currently, as noted in Question 6 above in the request for comments, an applicant that has received awards in previous rounds must demonstrate that it has met a minimum threshold amount of QEIs from those prior awards, an indicator of the applicant's ability to deploy the allocation efficiently and the applicant's ability to use/need for additional allocation. Those applicants that continue to meet the minimum threshold test, even after receiving very large allocations, will clearly demonstrate that they have the infrastructure, pipeline, and capital to deploy the allocation efficiently. As such, they should not only be allowed to but encouraged to continue to reapply as long as they are meeting the minimum threshold test. By prohibiting large awardees from reapplying for a period of time, the most efficient, effective applicants will automatically be disqualified. Additionally, assuming they do indeed meet the minimum thresholds but are not allowed to reapply for a period of time, they will likely run out of allocation before they are able to reapply and may be forced to reconsider keeping the infrastructure for the program. This is obviously not the intended outcome and would be detrimental to the NMTC program.

The restriction of limiting the ability of awardees to reapply will ultimately lead to a reduction of competition among CDEs. The cost of maintaining the infrastructure for the NMTC program is such that only public entities and financial institutions will have the ability to stay in the program. This would be an enormous setback for the NMTC program.

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We appreciate the opportunity to provide our feedback and comments to CDFI Fund, and we hope you find our observations and recommendations useful as you reassess and retool the Application. Please do not hesitate to contact me or Claudia Robinson should you wish to discuss any of these points further.

Sincerely,

A handwritten signature in black ink, appearing to read "Iris Bashein". The signature is fluid and cursive, with a long horizontal stroke at the end.

Iris Bashein
Senior Vice President